

**Summary of Testimony of Commissioner William L. Massey
Federal Energy Regulatory Commission
Subcommittee on Energy and Power, Committee on Commerce
United States House of Representatives
October 5, 1999**

The enactment of H.R. 2944, with certain amendments, can ensure an open, seamless and highly reliable interstate transmission grid that will in turn facilitate vibrantly competitive power markets.

- H.R. 2944's provisions subjecting all transmitting utilities to one set of rules should be enacted.
- Provisions requiring transmission owners to join regional transmission organizations (RTOs) by a date certain are in the public interest. There is, however, no reason to delay the deadline until 2003, and detailed legislative standards for institutions that may need to evolve over time are unnecessary.
- The marketplace is demanding mandatory reliability rules, but there may be no path to achieve this goal under existing law. H.R. 2944's provisions authorizing a private reliability standards organization to promulgate mandatory rules should be enacted.
- H.R. 2944's authorization for Commission review of mergers of generation facilities and holding companies is in the public interest. However, legislative deadlines for the Commission's review of mergers that raise serious market power concerns may undercut H.R. 2944's broader pro-competitive goals.
- Market power can smother embryonic competitive markets. I would suggest that H.R. 2944 be amended with language from H.R. 1828 and H.R. 2050 authorizing the Commission to examine and address market power in wholesale and retail markets in certain circumstances.
- A recent 8th Circuit Court of Appeals decision sanctions a state policy granting a preference for in-state uses of the interstate transmission grid. If broadly applied, this could balkanize the interstate grid. I recommend that Congress ensure that there is no discrimination against interstate users of the grid.
- PUHCA should be repealed. I agree with the thrust of H.R. 2944's provisions promoting renewable energy. Regional approaches to the siting of transmission facilities should be authorized.

In summary, I commend Chairman Barton's leadership on these complex issues, and would recommend the enactment of H.R. 2944 with the modifications noted in my testimony.

**Testimony of
Commissioner William L. Massey
Federal Energy Regulatory Commission
before the
Subcommittee on Energy and Power
Committee on Commerce
United States House of Representatives**

October 5, 1999

Mr. Chairman and Members of the Energy and Power Subcommittee:

My name is William L. Massey. I have served as a Commissioner of the Federal Energy Regulatory Commission since 1993. I welcome this opportunity to testify with respect to H.R. 2944, the Electricity and Competition Act of 1999. I congratulate Chairman Barton for introducing this important legislation.

I. Introduction

At this juncture in the transition to competition initiated by the Energy Policy Act of 1992 and Order No. 888, Congress can take the steps necessary to ensure an open, seamless and highly reliable transmission grid that will in turn facilitate vibrantly competitive power markets.

By making the entire interstate transmission grid, regardless of ownership, subject to open access rules, legislative reform can ensure nondiscriminatory access on a nationwide basis. Congress can ensure grid reliability by authorizing a private reliability standards organization that will promulgate mandatory reliability rules. By requiring all grid owners to form appropriately configured regional transmission organizations (RTOs), legislation can help mitigate residual vertical market power, capture for consumers the operational efficiencies created by grid regionalization, and promote large and robust power markets. By authorizing the Commission to mitigate horizontal market power in wholesale or retail markets that may arise from pockets of generation concentration, Congress can ensure that the price for power is determined by the forces of competition rather than by market manipulation.

Why should Congress act now? Simply stated, legislation is necessary to facilitate the removal of barriers that undercut the economic promise of competition. Market and grid access uncertainties that flow from such barriers can stifle investment in necessary

generation and exacerbate price volatility. Residual market power, a patchwork of grid rules, or rules followed merely on a voluntary basis, can smother embryonic competitive markets.

Although the prospect of mandatory grid reliability rules appears to enjoy broad industry support, under current law there is no clear path to achieve this goal. Moreover, roughly one third of interstate grid facilities are by law not subject directly to the Commission's pro-competitive policies and standards prohibiting discrimination.

In addition, existing jurisdictional uncertainties may make it difficult to ensure full industry participation in RTOs. Without full participation, the substantial pro-competitive benefits such institutions can facilitate will be available only on a patchwork basis.

Legislation can resolve these uncertainties that now hamper efforts to facilitate competitive wholesale markets and ensure a reliable national grid. And since all power sold at wholesale is ultimately consumed at retail, it is important to understand that efficient wholesale markets are a necessary predicate to efficient retail markets.

II. Comments on H.R. 2944

At the outset, let me generally associate myself with the testimony of Chairman Hoecker. He and I appear to be generally of a common mind on appropriate legislative reforms.

H.R. 2944 effectively addresses most of the issues mentioned in my introductory comments. The issues it resolves are complex and challenging ones, and I commend Chairman Barton for placing this bill before the House of Representatives.

Although my testimony will focus primarily on legislative reforms that will facilitate wholesale competition, I would like to note briefly for the record that I support retail competition as well. Although wholesale competition is beneficial for consumers in any event, its full promise will not be achieved in the absence of retail customer choice.

A. One Rule for All Transmitting Utilities (Section 102)

This legislation extends the Commission's authority to the grid facilities of all transmitting utilities, including federally-owned utilities, electric cooperatives and municipal utilities. This provision will ensure the benefits of the Commission's open access rules to the users of these facilities. I support this important provision.

Although state regulators in Texas have done a commendable job promoting competition within Texas, I would not further limit federal jurisdiction over ERCOT facilities. Accordingly, I would not recommend the enactment of the bill's language eliminating the Commission's section 211 jurisdiction over ERCOT.

B. Mandatory Reliability Rules (Section 201)

A strong industry consensus appears to support legislation to facilitate mandatory reliability rules. Such rules would provide a firm grid foundation for competitive markets. Section 201 provides that a private standards organization, composed of a broad and balanced cross-section of industry representatives and other experts, would promulgate mandatory rules subject to federal oversight. The North American Electric Reliability Council (NERC) has impressive expertise in this area, and it is my assumption that it will make the internal organizational structural changes, if any, that are necessary to qualify as the private standards organization envisioned by this bill.

It is my view that enactment of this provision is essential to maintaining grid reliability in a competitive era.

C. Regional Transmission Organizations (Section 103)

I strongly support this section's imperative that all transmitting utilities participate in RTOs, and I highly commend Chairman Barton's foresight in recognizing the value of such institutions and requiring universal participation. There is, however, little justification in my view for delaying mandatory RTO participation until 2003. Utilities are already aware that the Commission through its RTO Notice of Proposed Rulemaking has sent an unmistakable signal that the Commission intends for an RTO to form in every region of the country by December 15, 2001.

I am confident that the Commission would promulgate rules that meet the legislation's goals with respect to independence, scope and configuration, corporate form (for-profit and not-for-profit institutions), operational authority and efficiency. I see no reason for Congress to be prescriptive about such issues, or to provide detailed legislative standards for institutions that may need to evolve over time. I would, therefore, suggest the elimination of detailed legislative provisions describing RTO standards and features.

Given the legislation's mandate for RTO participation, I do not understand its rationale for financial incentives for utilities to form RTOs. The need to comply with federal law should be incentive enough, and joining bonuses would appear to be unnecessary. In addition, they are not free, and are paid for by grid users in the form of higher rates. I do, however, support incentives for good performance, measured by reliability, sound congestion management, solid plans for necessary grid expansion, customer satisfaction and similar standards. Well designed performance-based rate incentives would be good public policy.

With regard to determining appropriate RTO scope and configuration, I would prefer that the legislation rely upon the Commission's expertise to determine and apply appropriate factors. If, however, factors are to be specified in legislation, I would add a

provision allowing the Commission to apply "any other factor that the Commission determines will promote competitive bulk power markets, reliability and efficiency."

Moreover, I am assuming that transmission owners must join an RTO of appropriate scope and configuration, as determined by the Commission, in order to be in compliance with the legislation. Thus, I do not fully understand the legislative admonition that the Commission shall have no authority to point the utility toward a particular RTO. Absent circumstances I cannot envision, if a utility proposes to participate in an RTO in an inappropriate region (e.g., geographically separate from its operations), the Commission should have the authority to require participation in an appropriate RTO region. I would suggest that the legislation be clarified in this respect.

D. Mergers and Market Power Issues (Section 401)

The amendments to the Commission's authority to review mergers of generation facilities and holding companies are excellent and should be enacted.

For the bulk of mergers that raise no serious market power concerns, the specified deadlines for Commission action would be reasonable. Indeed, the Commission has moved expediently on mergers since issuance of our 1996 Merger Policy Statement. For mergers that do appear to raise market power concerns, however, a hearing before an administrative law judge is sometimes required to resolve factual issues. For such cases, I do not believe that legislative deadlines are appropriate. The Commission is always under pressure to move merger cases through the process as quickly as possible, consistent with thorough review. In such cases, a tight statutory deadline may lead to an ill-considered and hasty approval of an anti-competitive merger, or the unreasonable rejection of a merger that might otherwise be reasonably approved after more thorough review.

Like Chairman Hoecker, I note favorably that both H.R. 1828 and H.R. 2050 would authorize the Commission to examine and address market power in both wholesale and retail markets under certain circumstances. Retail markets will be regional markets that do not respect state boundaries, and it may be difficult for some states to evaluate retail market power in regional markets without federal assistance. Thus, these are important provisions. For robust competitive markets to develop and thrive, any residual market power should be recognized and appropriately mitigated.

E. Discrimination Against Interstate Transactions

Imagine you are driving around I-495, the Washington beltway, and a severe constraint develops due to a traffic accident. Let's assume that the State of Virginia has a policy that favors Virginia motorists. Virginia troopers require all vehicles without Virginia tags to exit immediately so that only Virginia-licensed drivers can travel on the beltway. Maryland applies the same discriminatory policy on the beltway to favor

Maryland-licensed motorists. This would impede commerce and would be completely chaotic and unacceptable on interstate highways.

Unfortunately, a recent decision of the 8th Circuit Court of Appeals, Northern States Power Co., et al. v. FERC, sanctions this same discriminatory scenario on the interstate electron highway. The court sanctions a preference for in-state uses of the interstate grid. During a constraint, wholesale transactions can be cut so that the local utility can favor its own in-state customers.

Power markets are regional, and do not respect state boundaries. A state-by-state balkanization of the interstate grid would be chaotic and unworkable, just like the hypothetical scenario on the beltway.

Congress should clarify the Federal Power Act to guarantee that all grid users are subject to the same rules, and cannot be bumped off the interstate electron highway by an in-state preference. Chairman Hoecker has suggested clarifying legislative language, which I heartily endorse, in his written testimony.

F. Miscellaneous Issues

Let me in closing comment briefly on three other issues addressed by H.R. 2944:

- I agree with the thrust of the provisions promoting renewable energy, and would endorse virtually any approach that does not distort the competitive marketplace. A portfolio approach is also a reasonable concept.
- I agree with H.R. 2944 that PUHCA should be repealed, while strengthening the "books and records" authorities of FERC and state regulators.
- Regional approaches for the siting of transmission wires are an excellent idea, and appear to track the bill's mandate for regional transmission operations.

III. Conclusion

I appreciate this opportunity to comment on H.R. 2944, and will be pleased to answer any questions.